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**AMERICAN BAR ASSOCIATION**

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## **AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION POLICY UPDATE**

**SEPTEMBER 2007**

### **Balanced Policy: Uniting Diverse Points of View**

The American Bar Association Section of Criminal Justice Council (CJS) is a collegial body that spends most of its meeting time evaluating criminal justice policy. The Section attempts to achieve parity in defense attorney and prosecutor representation to ensure a balanced approach to policy development on its governing body the Council. In discussions members often take counter intuitive policy positions in relation to their current practice setting as a result of high level and open deliberations. The CJS Council is the governing body for the Section and is made up of Prosecutors, Defense Attorneys, Judges and Academics. All policy positions of the CJS must be approved by the Council which consists of an approximate equal number of prosecutors and defense attorneys plus judges and academics. Every third year, the Chair of the Section is a Defense Attorney and every third year, the Chair is a Prosecutor. Judges and Academics alternate in the Chair position every third year.

Among the Council's make up are representatives of the following organizations: the United States Department of Justice, The National Association of Criminal Defense Attorneys, the National Association of Attorneys General, the National Legal Aid and Defender Association, the National District Attorneys Association and the Federal Public Defenders Association. Currently the Council has thirteen active prosecutors and six former prosecutors or DOJ staff; fifteen defense attorneys, three academics, a judge, a law student and a government agency attorney who changed jobs after being elected to Council as a prosecutor. Policy generally comes to the Council from CJS Committees including the Prosecution Function and Defense Function Committees where it is debated prior to being sent to Council. You can be assured that policy endorsed by the CJS has been developed and debated from all points of view within the criminal justice arena and as a result reflects the balanced perspective few other entities can provide.

### **POLICY APPROVED BY THE ABA HOUSE OF DELEGATES IN AUGUST 2007**

The ABA Criminal Justice Section endorsed recommendations on Medicaid eligibility for individuals incarcerated and newly-released from custody; adopting principles to govern criminal legal system responses to major disasters that maintain fidelity to the rule of law; calling on all bar associations and other regulatory bodies to waive dues and CLE requirements for deployed lawyers; urging Congress to pass legislation strengthening protections for victims of human trafficking; encourage jurisdictions to pass laws that require the provision of evidence-based pre-court diversion and early intervention services for youth who are alleged to have committed status offenses; integrating Rule of Law initiatives with global environmental issues; supporting procedures and standards designed to ensure whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege; and urging Congress to insure that detainees are treated in accordance of Geneva Convention guidelines. These were submitted to the House of Delegates for consideration at the annual meeting in San Francisco. All recommendations were approved as official ABA policy. For more information on these and other policies visit the ABA House of Delegates website [www.abanet.org/leadership/house/home.html](http://www.abanet.org/leadership/house/home.html).

### **Healthcare for Prisoners and Recently Released Persons**

As approved by the House of Delegates, the recommendation urges federal, state, local and territorial governments to maintain the Medicaid eligibility of otherwise-eligible incarcerated persons to provide continuity of Medicaid eligibility to persons newly-released from custody, and to suspend, rather than terminate, the Medicaid enrollment of persons who become incarcerated. For a copy of the recommendation and report visit

[www.abanet.org/leadership/2007/annual/docs/hundredtwentytwo.doc](http://www.abanet.org/leadership/2007/annual/docs/hundredtwentytwo.doc)

### **Preserving The Rule of Law During Calamity**

The Section co-sponsored the Section of Litigation's recommendation which includes but are not limited to the following principles designed so that the legal system maintains fidelity to the rule of law even in times of a major disaster: (1) the preservation of the rule of law requires proactive planning, preparation and training before a major disaster strikes; (2) all those involved in the justice system must work to assure the ongoing integrity of the system in times of major disaster; (3) in times of a major disaster the requirements of the Constitution regarding criminal prosecution must be respected; (4) Government assistance mandated by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency; and (5) to the extent feasible, attorneys should provide pro bono representation to persons affected by a major disaster who seek either compensation or assistance. For a copy of the recommendation and report visit

<http://www.abanet.org/leadership/2007/annual/docs/hundredthirteen.doc>

### **Bar Dues/CLE Waiver for Deployed Lawyers**

The Section co-sponsored a recommendation brought by the Section of Public Contract Law urging all bar associations and other regulatory bodies to adopt a policy that provides for the waiver or suspension of association dues, CLE requirements and other membership obligations for members who are serving in the U.S. Armed Forces and are performing services in a Combat Zone. Under such policy, a waiver or suspension may be requested by the member or by an individual authorized by the member, and membership dues, CLE requirements and other membership obligations will be re-activated upon the member's release from duty in a Combat Zone. Suspension or waiver of one's general membership obligations does not relieve a member of his or her duty to meet the bar's ethical requirements. For a full copy of the recommendation and report visit <http://www.abanet.org/leadership/2007/annual/docs/hundredfifteen.DOC>

### **Protection and Assistance for Victims of Human Trafficking**

The Section co-sponsored a recommendation brought by the Task Force on International Rule of Law Symposia that urges Congress to pass legislation that strengthens protection and assistance for victims of trafficking in persons, both citizens and non-citizens, and encourages state, local, territorial, tribal, specialty, and foreign bar associations to engage members of the legal profession in raising awareness of trafficking in persons in their communities and in providing pro bono legal services to victims of trafficking. A complete copy of the recommendation and report is available at <http://www.abanet.org/leadership/2007/annual/docs/hundredtenc.doc>

### **Early Intervention Services for Youth at Risk**

The Commission on Youth at Risk brought a recommendation urging state, local, territorial, and tribal jurisdictions to pass laws and support policies and programs that divert alleged juvenile status offenders from court jurisdiction that: (1) Mandate the development and implementation of targeted evidence-based programs that provide juvenile, family-focused, and strength-based early intervention and pre-court prevention services and treatment to alleged juvenile status offenders and their families; and (2) Promote the development of gender-responsive programs, treatment, and services for alleged juvenile status offenders. A copy of the recommendation and report is available at [www.abanet.org/leadership/2007/annual/docs/hundredfourc.doc](http://www.abanet.org/leadership/2007/annual/docs/hundredfourc.doc)

### **Avoiding Dismissal of a Civil Action Based on the State Secrets Privilege**

The Section of Individual Rights and Responsibilities brought a recommendation urging Congress to enact legislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervener) that: (1) Permits the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and draw no adverse inferences against the government

for doing so; (2) Requires the government to provide a full and complete explanation of its privilege claim and to make available for *in camera* review the evidence the government claims is subject to the privilege; (3) Requires a judicial assessment of the legitimacy of the government's privilege claims and deems privileged only evidence disclosure of which the court finds is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States; and (4) Entitles the government to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege, imposing sanctions for nondisclosure of such evidence, or refusing a protective order to prevent disclosure of such evidence. To view the full recommendation and report go to [www.abanet.org/leadership/2007/annual/docs/hundredsixteena.doc](http://www.abanet.org/leadership/2007/annual/docs/hundredsixteena.doc)

#### **Following Geneva Convention Guidelines for Detainee Treatment and Interrogation**

The Section co-sponsored a resolution urging Congress to enact legislation that: (1) Supersede the Executive Order of July 20, 2007, which authorizes the Central Intelligence Agency to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions of August 12, 1949; and (2) Ensure that whenever foreign persons are captured, detained, interned or otherwise held within the custody or under the physical control of the United States, or interrogated in any location by agents of the United States (including private contractors), they are treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with the standards of treatment and interrogation techniques contained in FM 2-22.3, the U.S. Army Field Manual on Intelligence Interrogation of September 2006. A copy of the recommendation and report is available at [www.abanet.org/leadership/2007/annual/docs/tenb.doc](http://www.abanet.org/leadership/2007/annual/docs/tenb.doc)

### **POLICY IN DEVELOPMENT**

#### **ETHICS, GIDEON AND PROFESSIONALISM COMMITTEE REVISED MODEL RULE 3.8**

The Section Council passed a recommendation to go to the House of Delegates at the Midyear Meeting in February advocating that when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority; and (2) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to the defendant unless a court authorizes delay, and undertake further inquiry, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. The proposed additions to the ABA Model Rules also advocate that when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. A complete copy of the recommendation is available at [www.abanet.org/crimjust/policy/revised3-8.pdf](http://www.abanet.org/crimjust/policy/revised3-8.pdf)

#### **WHITE COLLAR CRIME COMMITTEE Guidelines Governing Contact with Employees of a Business Organization**

The White Collar Crime Committee submitted policy recommendations to the Section Council at the Annual Meeting on August 9-12, 2007 on proposed guidelines under which the government would contact employees of a business organization. The draft analyzes whether the unintended effect of the DOJ's privilege waiver and other cooperation policies has been to encourage certain practices that may run afoul of numerous provisions of the Model Rules of Professional Conduct. The report includes proposed guidelines to address the conflicts and ethical issues implicated by the foregoing practices. The Council asked the committee to seek comments from the ABA Task Force on Attorney-Client Privilege. To view a copy of the pre-council meeting draft recommendations go to [www.abanet.org/crimjust/policy/contactemployees.pdf](http://www.abanet.org/crimjust/policy/contactemployees.pdf)

**Juvenile Justice Committee**  
**Sentence Mitigation for Youthful Offenders**

The Juvenile Justice Committee submitted a policy recommendation to the Section Council urging all federal, state, local and territorial governments to authorize and implement sentencing laws and rules of procedure that both protect public safety and give mitigating consideration to youthful offenders (i.e., those under age eighteen at the time of their offense) by adopting the following principles: 1) authorization and implementation of sentences for youthful offenders should generally be less punitive than comparable sentences for older offenders; 2) authorization and implementation of sentences for offenders under age eighteen at the time of their offense should recognize key mitigating considerations in sentencing youthful offenders, including those found by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 567-570 (2005); and 3) authorization and implementation of sentences for youthful offenders should require that such offenders be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. The Council suggested that the recommendation be amended with the following changes: a) 18 years old versus 16 as the age for criminal court jurisdiction; b) the harms caused by violent crimes and the impact on victims should be included in the report; and c) an additional principle should be created regarding states carving out exceptions, along with added dialogue that addresses mandatory minimums. The committee passed a motion to support the resolution as amended with Council concerns and will send back to the Council in November at the Fall Meeting and bring before the ABA House of Delegates in February. To view a copy of the pre-council meeting draft recommendations go to [www.abanet.org/crimjust/policy/sentencemitigation.pdf](http://www.abanet.org/crimjust/policy/sentencemitigation.pdf)

**Commission on Effective Criminal Sanctions**  
**Limiting Access to Criminal History Information**

In May 2007, the Commission began work on a policy recommendation on access to criminal history information. Based on testimony from employers, criminal background screeners, persons with criminal records, media attorneys and civil legal aid attorneys during our Spring Conference, the Commission is considering whether there are any circumstances under which records should be closed or sealed from general public access, and whether credit reporting agencies and others should be prohibited from disclosing records. The Commission is seeking to balance the values of open access and individual privacy that underlie criminal records policy, and the important public safety goals of successful offender reentry and reintegration. The Commission has not yet formally presented any recommendation to the ABA House of Delegates, in light of concerns expressed by the press and business community. For more information visit the Commission's website at [www.abanet.org/dch/committee.cfm?com=CR209800](http://www.abanet.org/dch/committee.cfm?com=CR209800).

**Standards Committee**  
**Prosecutorial Investigation Standards**

In August, the Section Council continued its first reading of proposed Criminal Justice Standards on Prosecutorial Investigations that began at the May Council meeting. The second reading of these Standards is expected to take place in November and, if approved at that time, they will be presented to the ABA House of Delegates in February, 2008. As requested at the May meeting, the Standards Committee has drafted and circulated to the Council and Committee chairs and co-chairs a Preamble explaining the scope of the Standards. In part, the Preamble reads: "These Standards are intended as a guide to professional conduct and performance for a prosecutor actively engaged in the conduct of a criminal investigation or performing a legally mandated investigative responsibility, e.g., serving as legal advisor to an investigative grand jury or as an applicant for a warrant to intercept communications. These Standards may not be applicable to a prosecutor serving in a minor supporting role to an investigation undertaken and directed by law enforcement agents." To view the proposed preamble to the Standards go to [www.abanet.org/crimjust/policy/prosecutorialinvestigations.pdf](http://www.abanet.org/crimjust/policy/prosecutorialinvestigations.pdf)

**Improving Procedural Fairness in the Federal Sentencing Process**

The Section supports the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. Specifically, the Section endorses the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report which calls for: (1) any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted

to the probation officer; and (2) where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties. A copy of the recommendation and report is available at [www.abanet.org/crimjust/policy/proceduralfairness.pdf](http://www.abanet.org/crimjust/policy/proceduralfairness.pdf)

**LEGAL PROBLEMS OF THE ELDERLY COMMITTEE**  
**Vigorous Prosecution of Crimes Against the Elderly**

At the Fall Meeting on November 2-4, 2007 The Legal Problems of the Elderly Committee plans to submit policy recommendations to the Section Council urging the following steps be taken by federal, state, local, and territorial governments and their prosecutors to vigorously prosecute cases of elder abuse, neglect, and financial exploitation; (1) creation of special elder abuse units within the prosecutor's office or designate a specially trained prosecutor to handle elder abuse cases; (2) ensure that the victim assistance/services program within the staffing structure of their offices develop policies, procedures and funding for providing specialized victim services to the elder population due to the unique needs of elder abuse victims and the many types of abuse inflicted on them; and (3) update state criminal statutes dealing specifically with the physical abuse, sexual assault, neglect and financial exploitation of elders and the need to take into account the special nature of elder victims and the types of crimes committed against them. A copy of the recommendation and report is available at [www.abanet.org/crimjust/policy/elderly.pdf](http://www.abanet.org/crimjust/policy/elderly.pdf)

For a summary of additional policy issues the Section of Criminal Justice is developing visit the Section's policy page at [www.abanet.org/crimjust/policy](http://www.abanet.org/crimjust/policy)